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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 196

MELVIN MORRIS, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims granting respondent's motion to dismiss petitioners' claims (Pet. App. 1a–2a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 23, 1962. The petition for a writ of certiorari was filed on June 19, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, upon restoration to federal employment, petitioners were entitled to monetary compensation

for annual leave which would have accrued to them during the period between their removal and restoration but for the statutory ceiling on accrued annual leave.

STATUTES INVOLVED

1. The Act of August 26, 1950, 64 Stat. 476, as amended, 5 U.S.C. 22–1, provides in relevant part:

* * * * *

> *Provided further,* That any person whose employment is so suspended or terminated under the authority of said section may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: * * *

2. 5 U.S.C. 2062 provides in relevant part:

* * * * *

> (c) The annual leave provided for in this section, which is not used by an officer or employee, shall accumulate for use in succeeding years until it totals not to exceed thirty days at the beginning of the first complete biweekly pay period, or corresponding period in the case of an officer or employee who is not paid on the basis of biweekly pay periods, occurring in any year.

3. 5 U.S.C. 2066 provides in relevant part:

> (a) In any case in which—
>
> (1) the amount of accumulated annual leave to the credit of an officer or employee immediately following the end of the last complete biweekly pay period in the calendar year 1952, or corresponding period in the case of an officer or employee who is not paid on the basis of biweekly pay periods, under the provisions of law then applicable to such officer or employee is in excess of the amount allowable under the applicable provisions of section 2062 of this title, or
>
> (2) the amount of accumulated annual leave to the credit of an officer or employee who is subject to the provisions of section 2062(d) of this title and who becomes subject to the provisions of section 2062(c) of this title is in excess of the amount allowable under section 2062(c) of this title, such excess shall remain to the credit of such officer or employee until used, but the use during any leave year of an amount in excess of the aggregate amount which shall have accrued during such year shall automatically reduce the maximum allowable accumulation at the beginning of the first complete biweekly pay period, or corresponding period in the case of an officer or employee who is not paid on the basis of biweekly pay periods, in the following leave year, until the accumulation of such officer or employee no longer exceeds the amount prescribed in the applicable provisions of section 2062 of this title.

4. Section 6 of the Lloyd-LaFollette Act, as amended, 62 Stat. 354, 5 U.S.C. 652, provides in relevant part:

> "(b)(1) Any person removed or suspended without pay under subsection (a) who * * * is reinstated or restored to duty on the ground that such removal was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. * * *

STATEMENT

Petitioners, civilian employees of the Army Signal Corps, were removed from their positions on security grounds by the Secretary of the Army pursuant to the authority conferred upon him by Executive Order 10450 and the Act of August 26, 1950, *supra*, p. 2 (R. 2 (Ducore and Yamins); R. 17 (Coleman); R. 3 (Morris)). At the time of their discharge, petitioners were paid the monetary value of their unused annual leave (R. 14, 28 (Ducore and Yamins), R. 59 (Morris)).[1]

In 1958, petitioners' discharges were set aside for procedural irregularities and they were ordered re-

[1] The record contains no information as to petitioner Coleman, but information subsequently furnished by the Department of the Army indicates that upon discharge he was paid the monetary value of his unused annual leave.

instated.[3] Petitioners were subsequently reinstated (R. 4 (Ducore and Yamins), R. 18 (Coleman), R. 34 (Morris)). Pursuant to the Act of August 26, 1950, 5 U.S.C. 22–1, *supra*, p. 2, petitioners were awarded appropriate back pay for the period of their discharge (R. 4–5 (Ducore and Yamins), R. 18 (Coleman), R. 34 (Morris)). According to Department of the Army records, petitioners were also credited with the maximum annual leave accruable under 5 U.S.C. 2062(c) and 2066, *supra*, pp. 2–3. (R. 28 (Ducore and Yamins), R. 59 (Morris)).[4] But, petitioners claimed, in addition, the monetary value of the annual leave which, except for the statutory ceiling on accumulated annual leave, would have accrued during the period between separation and restoration. This claim was denied and petitioners brought this suit in the Court of Claims.[5]

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[3] *Coleman, et al.* v. *Brucker*, 257 F. 2d 661 (C.A.D.C.); *Coleman, et al.* v. *Brucker* (D.C.D.C., Civil No. 3822-56, *et seq.*, October 17, 1958). Petitioners Ducore, Yamins and Coleman resigned forthwith (R. 4 (Ducore and Yamins), R. 18 (Coleman)); only petitioner Morris is presently employed by the Department of the Army (R. 34).

Again, the record contains no information as to petitioner Coleman, but the Department of the Army has informed us that petitioner Coleman was credited with 480 hours on reinstatement. He claimed 1054 hours. Petitioner Morris, claiming 880 hours, was credited with 406 hours on reinstatement (R. 59); petitioner Ducore, claiming 944 hours, was credited with 640 hours (R. 28); petitioner Yamins, claiming 994 hours, was credited with 720 hours (R. 28).

[4] The denial was based on long-standing administrative construction of the Act of August 26, 1950. See 35 Comp. Gen. 121; 38 Comp. Gen. 249; cf. 31 Comp. Gen. 58; 23 Comp. Gen. 204.

On cross motions for summary judgment, the Court of Claims, following its own decision in *Zeiger* v. *United States*, 295 F. 2d 915, dismissed the claim (Mr. Justice Reed dissenting).

ARGUMENT

Upon their restoration to federal employment, petitioners were paid their salaries for the entire period between their discharge and restoration (less any earnings from other employment). Additionally, they received annual leave credit up to the amount of such leave that may be accumulated by any federal employee. 5 U.S.C. 2062 and 2066, *supra*, pp. 2–3. In this action, petitioners seek an additional benefit: the monetary equivalent of accrued annual leave in excess of the ceiling. We submit that the Court of Claims correctly read the governing legislation as rejecting petitioners' claim for preferential treatment vis-à-vis employees whose federal service is uninterrupted. Moreover, the petition raises no issue of general importance. Review by this Court is, therefore, not warranted.

1. Annual leave, as the term itself indicates, is an employee's right to be absent from duty for a specified period each year without loss of pay. The employee who faithfully performs his duties throughout the year enjoys a period of rest from his work and, at the same time, receives the sal[illegible] prescribed by law for his services. To encour[illegible]ployees to take a period of rest each year, Con[illegible] placed a ceiling on the amount of annual leave that an employee may accumulate. Annual leave accumulated in excess of that

ceiling is lost by the employee.[5] Payment for accumulated leave is made only in exceptional circumstances, *i.e.*, when the employee dies or is separated from service, 5 U.S.C. 61g(6) and 61b.

Petitioners contend, in effect, that annual leave is additional compensation for services rendered. But that approach misconceives the purpose of the law. Annual leave does not, and was never intended to, augment an employee's salary. Rather, it is time off without loss of pay. That petitioners were unable to take annual leave as such does not now entitle them to special compensation. For, in reality, they lost nothing. When restored, petitioners were paid for all the time lost because of their removal; they received pay for the same amount of time as their fellow employees who worked continuously during their absence.

2. The identical issue raised here by petitioners was presented to the Court of Claims in *Zeiger* v. *United States*, 295 F. 2d 915. The court there considered

[5] It is clear that the privilege of accumulating leave is a matter of legislative grace, not inherent in the grant of annual leave. Under section 5 of the Act of March 3, 1893, 27 Stat. 715, as amended, 5 U.S.C. 30 (1934 ed.), leave which was unused during the year was not available thereafter. Accumulation was first permitted by section 215 of the Act of June 30, 1932, 47 Stat. 407, and no limit was placed on the amount that could be accumulated. The Act of March 14, 1936, 49 Stat. 1161, however, placed a ceiling of 60 days on accrued leave. This ceiling was increased to 90 days by the Act of December 17, 1942, 56 Stat. 1052; but, following the national emergency, the 60-day ceiling was re-enacted, by the Act of July 25, 1947, 61 Stat. 451. The present law, 65 Stat. 679 and 682, as amended, 5 U.S.C. 2062 and 2066, *supra*, pp. 2–3, provides for a 30-day ceiling, although employees who had accumulated leave under the previous higher ceilings are permitted to retain their accumulated leave until used.

and rejected the considerations stressed here and, in so doing, expressly overruled its previous holdings that an improperly discharged employee was entitled to annual leave in excess of the ceiling imposed by Congress, 5 U.S.C. 2062 and 2066. See, *e.g.*, *Hynning v. United States*, 141 Ct. Cl. 486.

a. Petitioners note that Section 6 of the Lloyd-La-Follette Act, as amended, 62 Stat. 354, 5 U.S.C. 652, *supra*, p. 4, contains an express provision excepting annual leave from the compensation to be paid a restored employee who had been discharged pursuant to that Act, and argue that the absence of a similar exception in the Act of August 26, 1950, *supra*, p. 2, shows that, upon reinstatement, an employee discharged pursuant to the more recent Act as a security risk should be credited with all the annual leave which he would otherwise have accumulated during the period of his suspension and removal (Pet. 11).

Petitioners are, of course, correct in pointing out a difference. Upon reinstatement, employees discharged under the 1950 Act do receive *some* annual leave credits. But there is nothing in the 1950 Act or its legislative history to indicate that Congress intended that the amount of annual leave credited to such an employee was not to be limited by the general ceiling prescribed in 5 U.S.C. 2062 and 2066. There is no basis for petitioners' suggestion that, by not barring these reinstated employees from any annual leave credit, Congress meant to remove, in their case, the statutory ceiling applicable to all federal employees. To the contrary, in the absence of an express provision

in the Act excepting their right to annual leave credit from the ceiling, we must assume it applies to them, like anyone else.[6] In short, the only inference that may fairly be drawn from the Act is that Congress intended to permit an employee improperly discharged as a security risk to receive the maximum annual leave consistent with the statutory ceiling applicable to all federal employees.

b. Nor is there any support for petitioners' repeated assertion that the 1950 Act was intended to provide "full monetary restitution to an employee who has been wrongfully discharged on security grounds and who is subsequently reinstated" (Pet. 9) and that, contrary to Congressional intent, the Act has been "interpreted and administered in a niggardly, restrictive way * * * inconsistent with the spirit of the statute" (Pet. 13). The express provisions of the Act limit the back pay of a reinstated employee to an amount based upon the difference between the rate the employee "was receiving on the date of suspension or termination * * *" and his interim net earnings. 5 U.S.C. 22–1.[7] The Act makes no provision for in-grade increases or legisla-

[6] Although the present ceiling, 65 Stat. 679 and 682, as amended, 5 U.S.C. 2062 and 2066, was not in effect at the time of the enactment of the Act of August 26, 1950, there was a ceiling in effect at that time, 56 Stat. 1052; 5 U.S.C. 2066(a) provides that employees, such as petitioners, who accumulated annual leave under the previous higher ceiling may maintain this higher ceiling until such excess leave is used. Thus, the ceiling applied to petitioners here was actually the same as the one in effect when the Act of 1950 was enacted.

[7] This provision is identical to that of the Lloyd-LaFollette Act, as amended, 62 Stat. 354, 5 U.S.C. 652, *supra*, p. 4.

tive increases which the employee would otherwise have received. Obviously, the restitution granted by Congress is not without reasonable limits and it was certainly not intended to equal the maximum possible compensation that an employee may have lost. But, in any event, as the court below noted in *Zeiger*, to allow an employee to receive payment for annual leave accumulated in excess of the statutory ceiling during a period of removal would permit the discharged employee to receive *more* than he would have been paid had he remained on the pay roll. Such a result, of course, would be inconsistent with the express provisions of the Act which limit such an employee's recovery to the minimum amount he would have received during the period of his removal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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